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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1573

METROPOLITAN LIFE INSURANCE COMPANY,
Petitioner,

v.

MARY LOUISE EDWARDS and
OLIVER L. JOHNSON, LIVINGSTONE M. JOHNSON
and JUSTIN M. JOHNSON, co-partners under the
name of JOHNSON, JOHNSON & JOHNSON,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner, Metropolitan Life Insurance Company, prays that a writ of certiorari issue to review the judgment of the Superior Court of Pennsylvania, entered November 14, 1969, reversing three orders of the Court of Common Pleas of Allegheny County, Pennsylvania, one allowing petitioner its costs as an interpleading stakeholder, and another discharging petitioner from liability for the amount it paid into court, as being claimed adversely by the individual respondent and the co-partner respondents, and from costs thereafter accruing, and remanding the case to that Court with a direction that the Prothonotary enter judgment in favor of the co-partner respondents, without hearing petitioner's rebuttal evidence.

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania is reported at 215 Pa. Superior Ct. 390 (259 A.2d 183). The Court of Common Pleas of Allegheny County, Pennsylvania, on December 5, 1968 entered two orders, without written opinion, in favor of the defendant, petitioner here, after a hearing held on the defendant's petitions, and the co-partner respondents' answers thereto, one for discharge from liability in respect to moneys paid into court and costs thereafter accruing, and the other for the award of its costs from the fund. A third order of the same date divided the balance of the fund between the adverse claimants, i.e. the original plaintiff, individual respondent here, and the additional plaintiffs, co-partner respondents here. The three orders were made pursuant to findings and conclusions of the hearing judge delivered in open court. Set forth in the Appendix hereto are the opinion of the Superior Court of Pennsylvania by Judge Cercone (page 16), the concurring opinion by Judge Spaulding (page 31), the three orders of the Court of Common Pleas (pages 39, 40 and 41) and the transcript of the oral findings and conclusions of the hearing judge (page 33).

JURISDICTION

Jurisdiction to review by writ of certiorari the judgment of the Superior Court of Pennsylvania is invoked under 28 U.S.C. §1257(3). Its order reversing the Court of Common Pleas of Allegheny County, entered on November 14, 1969, is reproduced in the Appendix at page 42. The Superior Court of Pennsylvania denied the petitioner's petition for reargument on December 4, 1969. The Supreme Court of Pennsylvania on February 16, 1970, denied the petitioner's petition for leave to appeal. These orders are reproduced in the Appendix at pages 45 and 47, respectively.

QUESTION PRESENTED

The defendant in a state court contract action interpleaded adverse claimants and paid the disputed amount into court, disclaiming all interest therein, and petitioned for a discharge from liability and award of its costs. The interpleaded claimants filed answers charging partiality toward and collusion with the original plaintiff. At the hearing the defendant's principal witnesses in rebuttal to the charges of partiality and collusion were not heard, for the reason that the relief sought was granted on the defendant's motion made upon the interpleaded claimants' resting their case in proof of such charges. The motion specifically reserved the right to offer such rebuttal if the motion should be denied. The state appellate court reversed the orders of the trial court and remanded the case for the entry of judgment against the defendant without further hearing.

Was the defendant denied due process of law under the Fourteenth Amendment to the Constitution by being barred from introducing its rebuttal testimony?

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in material part:

> ". . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT

This is an interpleader case arising out of a contract action against the petitioner, defendant below, for $8,036.77, being forty percent of the amount agreed upon in the settlement of an earlier contract action by the individual respondent, plaintiff below, hereinafter referred to as Edwards, and her minor children against the defendant, herein called Metropolitan, wherein the co-partner respondents, additional plaintiffs below, herein referred to as the Johnsons, were counsel of record for the plaintiffs. The balance of the settlement amount had been paid directly to Edwards with the consent of the Johnsons; the portion presently involved remained unpaid because, while the Johnsons claimed it under a contingent fee agreement with Edwards, she disputed their claim and refused to endorse the joint check delivered to them by Metropolitan at the closing of the settlement. The question presented is whether the Superior Court of Pennsylvania denied Metropolitan its right to procedural due process under the Fourteenth Amendment to the Constitution of the United States by reversing the Court of Common Pleas of Allegheny County, Pennsylvania, which had ordered that Metropolitan be discharged from liability and awarded its costs, and remanding the case for the entry of judgment awarding the whole of the disputed fund to the Johnsons, without allowing Metropolitan to offer its case in rebuttal to the Johnsons' contentions that it had been partial to and colluded with Edwards.

By a series of orders of the trial court, the Johnsons were ordered to interplead, the amount in dispute and interest of $128.15 was paid into court, and judgment against Edwards and in favor of the Johnsons

(but without an award of the disputed fund) was entered in default of an answer by her to their statement of claim. On her appeal the Superior Court of Pennsylvania affirmed per curiam (212 Pa. Superior Ct. 751, 242 A.2d 281). On this appeal Metropolitan, while named an appellee, was a mere stakeholder; its right to a discharge and allowance of costs was not involved because it had not yet been heard or ruled on by the court below.

Upon return of the record to the court below, a hearing was held before the Honorable Arthur Wessel, Jr., upon two petitions of Metropolitan, one to be discharged of liability for the amounts paid into court and costs thereafter accruing, and the other to be allowed out of the fund its costs including a counsel fee, and also upon the petition of the Johnsons to be awarded the entire fund. Metropolitan's two petitions were opposed by the Johnsons, who charged that Metropolitan had disentitled itself to the relief requested by engaging in a course of conduct that displayed partiality and amounted to collusion with Edwards (155a, 158a).* Metropolitan offered, as its case in chief, admissions by the Johnsons in their answers to the petitions and in other pleadings in the case, and then rested. On the Johnsons' motion to dismiss, the trial judge held that a prima facie case was made out (226a), and the Johnsons then presented testimony and evidence in their defense against Metropolitan's petitions. The cross examination of their principal witness, Livingstone M.

*Reference to portions of the record reproduced in the paperbooks filed in the Superior Court of Pennsylvania are by page number followed by the letter "a" if to the appellant's paperbook, and the letter "b" if to the appellee's paperbook.

Johnson, was interrupted to permit a rebuttal witness, Jack B. Helitzer, to be heard. Helitzer, an attorney employed by Metropolitan at its home office in New York City (484a-485a), was brought to Pittsburgh in response (481a-482a) to complaints by the Johnsons (e.g. 353a) that they had not had an opportunity to question anyone from Metropolitan about its knowledge of the case, but they declined the opportunity to put him on the stand (482a), and the defendant was permitted to do so in the hope that he would not have to return later (482a-483a). When the Johnsons rested their case in defense against Metropolitan's petitions, Metropolitan moved the court to grant the relief prayed for in the petitions, but reserved the right, if the court should refuse the motion, to offer testimony in rebuttal, particularly the testimony of its counsel (778a-779a). The court granted the motion, without hearing such rebuttal, on the ground that the Johnsons' evidence did not make out a case of partiality or collusion (784a). The orders of the court below granted Metropolitan a discharge from liability (835a), awarded it costs and a fee fixed at a total of $500 (836a) and divided the balance of the fund $6,500 to the Johnsons and $1,132.84 to Edwards (837a). These orders are reproduced hereinafter at pages 39, 40 and 41. The opinion of Judge Wessel (Appendix page 33), handed down orally in open court (782a-788a), has not been reported. On appeal by the Johnsons the orders were reversed by the Superior Court of Pennsylvania, which held the Johnsons entitled to the entire fund plus interest and costs, without deduction of any costs or fee for Metropolitan, and remanded the case "solely for the purpose of having the Prothonotary enter the judgment as

herein modified on the appropriate dockets." The opinion of the Superior Court, by Judge Cercone, with a concurring opinion by Judge Spaulding, was filed November 14, 1969, and is reported at 215 Pa. Superior Ct. 390 (259 A.2d 183), and set forth hereinafter at page 16.

Metropolitan in its brief on appeal in the Superior Court, adverting to its reservation in the trial court of the right to offer rebuttal, pointed out that, should there be a reversal, the case would have to be sent "back to the lower court for another hearing, because the defendant had not presented its case in rebuttal" (Metropolitan Brief, 13-14).

Metropolitan in its Petition for Reargument (Appendix page 43), addressed to and refused by the Superior Court, set forth in detail the particulars in which the Superior Court, as shown by its opinion, misapprehended the facts of the case, stated what its testimony in rebuttal would show to the contrary of the Superior Court's findings, and asserted, in paragraphs I(3), II(4) and III(2), its right, under the due process clause of the Fourteenth Amendment to the Constitution of the United States, to be heard in rebuttal. Upon refusal thereof by the Superior Court on December 4, 1967, Metropolitan filed in the Supreme Court of Pennsylvania, at Miscellaneous No. 3182A, its Petition for Allowance of Appeal to the Supreme Court, wherein in paragraph 6, which is set forth in the Appendix at page 46, the due process right was reasserted, but this petition was denied on February 16, 1970.

REASONS FOR GRANTING THE WRIT

I. Metropolitan Has Been Deprived of Due Process of Law Contrary to the Fourteenth Amendment by the Decision of the Superior Court of Pennsylvania, Because the Case Has Been Decided Against It Without Its Ever Having Had the Proper Opportunity to Present Its Evidence in Rebuttal.

In the trial court the Johnsons' motion to dismiss was refused, Judge Wessel holding that Metropolitan had made out a *prima facie* case without undertaking to disprove the Johnsons' charges of partiality and collusion (226a-227a, 250a-2). On the Johnsons' resting in defense, Metropolitan moved for the relief it sought (691a-692a) and, after Edwards' defense to the Johnsons' claim for the fund was heard, renewed its motion (778a-779a):

"Mr. Black:

If the Court please, you will remember that when the Johnsons closed their case in opposition to the two motions that I filed on behalf of Metropolitan Life, I mentioned that in addition to Mr. Helitzer's testimony which was offered in rebuttal out of order because of his being an out-of-town witness, I intended to offer myself as a witness; but first I made a motion with respect to each petition. I wanted to make that motion before, because under the Canons, as I understand them, once I become a witness I am not to act as attorney in the case any more. That motion was that the relief requested in my two petitions for discharge and for costs and fee be allowed at this time; first, because it is not good ground for denying them even if the additional

> plaintiffs have proved that the Metropolitan Life was not impartial and did collude with one of the parties in the controversy; the second ground is that their proof of that didn't measure up, it is incredible and inadequate.
>
> I would ask that the Court would rule on those motions now. If they are to be denied, then I intend to go on the stand to testify myself."

Judge Wessel ruled in favor of Metropolitan, stating his findings and conclusions orally in open Court (782a-788a), and specifically based his decision on the ground that the Johnsons had not proved connivance or partiality (784a-785a, Appendix pages 34-35).

When the Johnsons appealed to the Superior Court of Pennsylvania from, *inter alia,* the orders of Judge Wessel granting Metropolitan a discharge and its costs, Metropolitan in its brief explicitly brought to the Court's attention the procedural posture of the case when its petitions were granted and the orders were entered, and reiterated its reservation of the right to offer evidence in rebuttal if there should be a reversal. Thus at pages 13-14 of Metropolitan's brief in the Superior Court, after pointing out that there were two grounds for the motions below, Metropolitan stated:

> "For a reversal both of those questions would have to be resolved against the defendant and in favor of the additional plaintiffs, and in that case the reversal would merely result in sending the case back to the lower court for another hearing, because the defendant had not presented its case in rebuttal."

The Superior Court, however, reversed and remanded the case for entry of judgment by the Prothonotary, saying that it saw no reason for remanding the matter for a further hearing, the rights of the parties clearly appearing of record. In so holding the Superior Court of Pennsylvania acted contrary to the decision of your Honorable Court in the case of *Saunders v. Shaw*, 244 U.S. 317, 61 L.Ed. 1163, 37 Sup. Ct. 638.

The case of *Saunders v. Shaw* was a suit for an injunction against the collection of a drainage tax, wherein the plaintiff offered evidence to show that the land taxed was outside of the levee system that the drainage commissioners were building, that it would receive no benefit and really was an island or islands in the Gulf of Mexico. The defendant objected and the evidence was excluded as inadmissible under the pleadings, but it was spread upon the record and completed in order to carry the case to the Supreme Court. Judgment was entered for the defendant and intervenor, and was affirmed on appeal by the Supreme Court of Louisiana. On rehearing, however, that court, observing that the testimony showed that the land had not been benefited, reversed the judgment and granted an injunction. Upon application to your Honorable Court by the intervenor, asserting that he had been deprived of due process of law contrary to the Fourteenth Amendment, because the case had been decided against him without his ever having had the proper opportunity to present his evidence, the judgment was reversed, this Court, speaking through Mr. Justice Holmes, saying (244 U.S. at page 319):

"Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show

> that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view."

Applying this to the case at bar, when Judge Wessel ruled that the Johnsons had failed to make out *prima facie* their charges of collusion and partiality, Metropolitan was not bound to go on and offer evidence to contradict charges that the Johnsons had failed to prove in their case in defense against Metropolitan's petitions. In *Saunders v. Shaw* your Honorable Court acknowledged that the Supreme Court of Louisiana may have thought that the case was so plain on the uncontroverted facts that to remand it would be a mere concession to technicality, but said (244 U.S. at page 319):

> "It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

The necessity of giving Metropolitan in the case at bar a chance to put its rebuttal evidence in is all the more apparent when it is remembered that the Superior Court reversed, and directed judgment against Metropolitan, not only on a record which was devoid of the rebuttal evidence Metropolitan seeks to put in, but also by treating as adequate and credible evidence of the Johnsons which Judge Wessel, who heard and saw the witnesses testify, had specifically found insufficient and unconvincing.

The rebuttal testimony given by the witness Jack B. Helitzer was not a satisfaction of Metropolitan's constitutional right to be heard in rebuttal. During cross-examination of the Johnsons' principal witness, Metropolitan's counsel pointed out to the trial judge (507a):

"Mr. Black:

> Your Honor, as you will see when I come back on rebuttal, we are going to offer testimony that will flatly contradict the great bulk of what this witness testified to about that conversation in January, 1966. In fact, I propose to get on the stand myself to testify to that. In cross examining this witness, I believe I am entitled to question him in the manner I have to test his credibility because apparently this is going to come down to a question of whether the Court is to believe the witness, Livingstone Johnson, or the witness, Alexander Black."

The Johnsons' effort to show partiality and collusion on the part of Metropolitan consisted as a practical matter of testimony by Livingstone M. Johnson regarding statements allegedly made by Metropolitan's counsel Black in conversations with him, testimony which could be contradicted or explained only by testimony from Black. As the witness Helitzer testified (563a), what he knew of the controversy he learned from Metropolitan's local counsel and it is plain that he would not have known, except by hearsay, and could not have testified to, the conversations in question.

II. The Claim of a Constitutional Right Was Made by Metropolitan at the Earliest Possible Time.

Metropolitan first raised the due process objection in its petition for reargument to the Superior Court

(Appendix page 46), but this was in time. As your Honorable Court remarked in Mr. Justice Holmes' opinion in *Saunders v. Shaw, supra,* at 344 U.S. 320:

> "The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance."

In that case this Court held that the claim of denial of due process was timely made although it was first made in an application for rehearing which the state court refused. In disposing of the contention that the claim was not timely made, this court said (344 U.S. at page 320):

> "But when the act complained of is the act of the Supreme Court done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here . . . We do not see what more he could have done."

CONCLUSION

The petition for a writ of certiorari as prayed for should be granted to correct the decision of the Superior Court of Pennsylvania, which, contrary to the holding of your Honorable Court in *Saunders v. Shaw,* 244 U.S. 317, deprived Metropolitan, in violation of the due process clause of the Fourteenth Amendment, of its right to offer rebuttal evidence.

Audi alteram partem: Broom's Legal Maxims (9th ed., 1924), p. 78.

Respectfully submitted,

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APPENDIX

IN THE SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

MARY LOUISE EDWARDS, Appellee v. OLIVER L. JOHNSON AND LIVINGSTONE M. JOHNSON AND JUSTIN M. JOHNSON, Co-partners under the name of JOHNSON, JOHNSON & JOHNSON, Appellants v. METROPOLITAN LIFE INSURANCE CO. Appellee	No. 89 April Term 1969

Appeal from the Orders of the Court of Common Pleas of Allegheny County, Pennsylvania at No. 1040 July Term, 1967.

Filed: November 14, 1969

Opinion of Superior Court

OPINION BY CERCONE, J.:

Mary Louise Edwards, claimant, employed the law firm of Johnson, Johnson & Johnson of Pittsburgh, to represent her in her claim against the Metropolitan Life Insurance Company as beneficiary under a family policy issued on the life of one Joseph Rumble, who died July 10, 1959, just four months after purchasing the policy. A written agreement between the Johnson firm and claimant provided that the attorneys were to receive forty (40%) per cent of any recovery, whether by settlement or trial. The insurance company at first re-

fused payment on the ground that despite her designation in the policy as "wife", claimant was not legally married to decedent and that she and the decedent had defrauded the company in so misrepresenting a material fact in a family policy of the kind issued to the deceased, Joseph Rumble. Upon learning of the company's refusal and position in the matter, the Johnson firm upon request of the claimant filed a complaint in her behalf against Metropolitan. Metropolitan filed an answer formally denying liability on the ground that fraud had been practiced upon it by both the decedent and the claimant.

Nothing happened in the case until November, 1965, when Metropolitan advised Johnson that it was prepared to amicably settle the suit for the commuted value of the policy, and on December 2, 1965, claimant authorized Johnsons, her lawyers, to accept one of the optional modes of settlement made available to her under the policy and this acceptance was communicated to Metropolitan which in turn replied that a release would issue as soon as birth certificates of the children and of the claimant's intervening marriage to a Mr. Edwards were forwarded. The total proposed settlement amounted to $20,091.02 consisting of $17,323.99 cash and policies valued at $2,767.93. The attorney's fee of forty (40%) per cent under the written agreement with claimant amounted to $8,036.77.

However, after receipt of the birth and the marriage certificates, Metropolitan refused to send a check for the total settlement amount, which check they had already prepared as payable to claimant and Johnsons, because the Company had received word from a member of the Allegheny County Bar Association (with whom

claimant, without Johnsons' knowledge had conferred) that the forty (40%) per cent fee was being contested.[1]

Claimant then brought the matter before the Allegheny County Bar Association and Attorney William Jacob, Vice President of the Committee on Offenses of the Common Pleas Court of Allegheny County, made an investigation of the case studying the Johnson files and submitting a report to the Committee in which he concluded that there was no impropriety in the case on the part of the Johnson firm and that the attorneys had earned their fees. Metropolitan nevertheless did not release the settlement. The Johnson firm in order to further expedite the settlement, and by agreement with Metropolitan, secured from claimant an express assignment to the Johnsons of the forty (40%) per cent of the recovery amount, the assignment having been prepared by Mr. Jacob of the Committee on Offenses. The assignment was then forwarded to Metropolitan. Despite the assignment which would have entitled the Johnson firm to receive a check for the forty (40%) per cent fee in their name alone, they were agreeable to having the Company issue one check to claimant for her portion of the cash settlement and one check jointly to claimant and themselves for their forty (40%) per cent fee. Claimant thereafter, without any knowledge or notice of Johnsons, notified Metropolitan not to honor the assignment claiming she was coerced into

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1. This intervention by an attorney in a case where another lawyer has already been retained is fraught with danger in the field of professional ethics especially when he acts without advising retained counsel. In such circumstances, the canon of ethics regarding transactions and negotiations among lawyers should always be carefully studied and observed.

signing the same. Metropolitan never advised Johnsons of the communication from claimant and yet permitted Johnsons to secure court approval of the settlement, to mark the case settled and discontinued, and to forward a certificate of satisfaction to Metropolitan.

Despite knowledge that claimant would not honor or endorse the check for the attorneys' forty (40%) per cent fee, Metropolitan, nevertheless, sent to claimant the check for her portion of the settlement. Johnsons, because of claimant's refusal to sign the check jointly payable to her and the Johnsons, did not receive their fee and Metropolitan refused to pay them directly because of the revocation of the assignment by claimant. At this point in the case, Metropolitan asked that one of the parties bring suit against it in order that it could interplead the funds.

Claimant thereupon instituted an action in assumpsit against Metropolitan for the amount still unpaid to her, that is, of the attorneys' fee, plus interest. Metropolitan then interpleaded, joining Johnsons as adverse claimants to the fund, and paying into court the $8,036.77 plus interest. The Johnsons petitioned for a rule to show cause why the order granting the interpleader should not be vacated and the interpleader stricken, which petition was denied and from which no appeal was taken by Johnsons. Upon rejection of their petition to strike the interpleader, Johnsons filed their claim in the interpleader proceedings setting forth the history of the case, the contingent fee agreement and the assignment. They claimed that by virtue of agreement and assignment, the $8,036.77 should be paid to them. Claimant filed no answer to this complaint and as a result, after due notice to her, and after hearing, the Honorable

Albert A. Fiok entered judgment against her and in favor of Johnsons. Claimant filed a petition to open, vacate or modify that judgment, but the petition was denied by Judge Aldisert. The said orders of Judge Fiok, granting judgment in favor of the Johnsons, and of Judge Aldisert, refusing to open, vacate or modify that judgment, were appealed by claimant to this Court as Nos. 27 and 28 April Term, 1968, and we affirmed per curiam the lower court in both instances (*Edwards v. Metropolitan Life Insurance Company,* 212 Pa. Superior Ct. 751). Claimant filed with the Supreme Court of Pennsylvania a Petition for allowance of appeal to that Court, which petition was denied at Miscellaneous Docket No. 3042-A on August 13, 1968.

Metropolitan then petitioned for discharge from liability and for allowance of costs and attorneys' fees from the interpleader fund. Johnsons added their petition for payment of the entire fund to them. Hearing was held on said petitions before His Honor Judge Wessel, in which Metropolitan sought to acquit itself of the charges that it had unlawfully interfered with Johnson's contingent fee agreement and that it was not an impartial stakeholder. Claimant sought to show that the Johnsons had not earned a forty (40%) per cent fee and had not treated her properly in the case.

After an extensive hearing, Judge Wessel handed down an opinion concluding that claimant had been fully informed by Johnsons as to the content of the 60-40% contingent fee contract when she signed the same, that Johnsons "acted for the best interest of their client, they have done good work, and certainly deserve the compensation to a good steward, so to speak;" but that, "on the basis of the plaintiff's complaint of this

dire need of funds and because of the minors involved—we feel that the claim of 60-40 should be reduced." Accordingly the court reduced the Johnsons' fee from $8,036.77 to $6,500 and allowed Metropolitan costs and attorneys' fees not to exceed $500.00, and awarded claimant an additional $1,132.84. Judge Wessel discharged Metropolitan of all liability to Johnsons.

Johnsons have appealed from the December 3 and 5, 1968, orders of Judge Wessel contending: (1) the pattern and course of conduct of Metropolitan in interfering in the attorney-client relationship here involved was such as to absolutely preclude its asserted right to recover costs and counsel fees, and bars its discharge from an interpleader action brought about solely through its own deeds; (2) the parties may not relitigate an issue once it has finally been decided on appeal, nor will equity permit the unjust enrichment of a party such as claimant who knowingly contracts for, accepts, and benefits from her attorneys' services.

Johnsons also appealed from the refusal of their Petition for Rule to Show Cause why the Order Granting the Interpleader should not be vacated and the Interpleader Stricken. However, it is now too late to appeal from the grant of the interpleader since the refusal of the Johnsons' Petition to strike off the interpleader was, under the facts of this case, a final and not an interlocutory order. This is so, because in their Petition Johnsons denied the following: that Petition for Interpleader was filed in good faith, that it was not in collusion with any party to the actions, that Metropolitan had no interest in the money in controversy and setting forth Metropolitan's stated interest in the fund, and further alleged various improper ac-

tions on the part of Metropolitan in its conduct toward the other parties in the case. The Johnsons denied therein that Metropolitan had not admitted the claim of one of the parties. In effect, Johnsons contended that on the basis of their denials and allegations of their petition to strike, the interpleader was not a proper action because Metropolitan was not an impartial stakeholder. Thus, the court's order granting the interpleader and rejecting Johnsons' petition was a final and appealable order and Johnsons should have appealed from that order if they had so desired. Having failed to timely appeal therefrom it was now too late to do so. As stated in *Fisher v. Stevens Coal Co.*, 136 Pa. Superior Ct. 394, at pages 396-397:

> "But where the petition for interpleader shows on its face that the petitioner is not a mere stakeholder, but has an interest in the controversy, or has taken some action recognizing the claim of one of the parties as valid, as over against the other, or has incurred a personal liability to either claimant or to both claimants, or has taken any other position that is inconsistent with that of an impartial stakeholder, so that the order of the court directing the money to be paid into court and the claimants to interplead with reference thereto will affect the substantive right of recovery which either of the parties claimant may have against the petitioner as a debtor growing out of a contractual obligation between the, — or where this fact otherwise clearly appears on the rule granted on the petition — the order of the court in such event is not interlocutory but is definitive and determinative of substantive rights and is therefore appealable."

The later case of *Winnet v. Brenner,* 409 Pa. 150, noted such to be the general rule and after quoting from the Fisher case, distinguished it by holding that the party interpleading was a naked stakeholder with no interest in the fund.

We need not determine the further issue raised by Metropolitan that since the additional plaintiffs (Johnsons) were served and brought on the record only after the order of Interpleader was made only the original plaintiff can attack the Interpleader.

It does not follow, however, that because Johnsons cannot now appeal from the grant of the Interpleader that they cannot appeal from the lower court's distribution of the interpleaded fund and the grant of the costs and attorney fee to Metropolitan. Metropolitan argues that once an interpleader is granted and the money is paid into court, the court is without any discretion but to discharge it from further liability and from further costs and to allow it costs and a reasonable attorney fee. However, we do not agree. Rule 2307 of the Pennsylvania Rules of Civil Procedure provides:

> "(a) Upon granting a petition for interpleader, the court shall make such order *as may be deemed just under the circumstances* relating to the payment or delivery into court, or to such persons as the court shall direct, of any money or property in controversy disclaimed by the defendant." (Emphasis supplied)

The lower court's decision as to what payment it deemed just under the circumstances is subject to review by this court and if same constitutes an abuse of discre-

tion under the facts and governing law we are constrained to reverse the same. The same is true with the order discharging Metropolitan and allowing its costs and attorney fee. Subsections (b) of the above stated Rule 2307 of the Pennsylvania Rules of Civil Procedure provides:

> "(b) When the defendant has complied with such order, the court shall enter an order discharging him of all liability to the plaintiff and to any interpleaded claimant who has been served as required by these rules in respect to the money or property so paid or delivered. *If the defendant has disclaimed all interest* in the action the court in its order shall also discharge him from all liability for any costs accruing after the entry of the order and shall allow him the costs incurred by him in the action, to be paid from such money or property in the first instance and taxed as costs in the action."

Metropoliton argues that its discharge from liability should be affirmed regardless of what evidence the Johnsons might have been able to adduce in support of their claim of impartiality or collusion and cites Rule 2307 (b) of the Pennsylvania Rules of Civil Procedure which sets forth the provision for such an order of discharge without any stated requirements of impartiality and lack of collusion. Metropolitan also argues that the only requirements for an order granting it costs and allowing it attorney fees is that it shall have disclaimed all interest in the action, and that it met this requirement.

The allowance of attorneys' fees to the stakeholder is authorized by the Act of May 21, 1943, P. L. 471, 12 P.S. §583, which provides:

> "Whenever hereafter any person, partnership or corporation having in possession money which is claimed by two or more persons or corporations, shall come into any court of record in this Commonwealth, either at law or in equity, and disclaim all interest in the funds, procure an interpleader between the rival claimants to determine the true ownership of the funds, and pay the said funds into court, or as the court may direct, the court shall allow the stakeholder out of the funds paid into court, its costs and *such reasonable counsel fee as the Court may determine to be proper,* to be taxed as costs of the proceeding."

Where, however, it is shown that the interpleader has ceased to be a disinterested party or a mere stakeholder faced with conflicting claims, or has not acted in good faith in the matter, or has sought to protect its own interests in the matter, such interpleader cannot be allowed costs and counsel fees under the above Act: *Nell v. McCrea,* 16 D. & C. 2d, 555, 9 Cumb. 12; *Shain v. Didio,* 15 D. & C. 2d 173, 20 Monroe L.R. 101, 74 Montg. 225; In re *Bunn Estate,* 12 Bucks 671, affirmed 413 Pa. 467, 198 A. 2d 518.

When Metropolitan permitted Johnsons to secure court approval of the settlement and to have the docket marked settled and discontinued and a certificate to that effect forwarded to it, without divulging to Johnsons that claimant, their client, had communicated directly with Metropolitan's counsel that she would not

honor any assignment made by her, Metropolitan at that point, if not before, became a partial participant in the controversy. By its silence, it knowingly and intentionally set in motion a chain of events which no impartial viewer of the facts would have tolerated or permitted. Metropolitan's lack of impartiality in the matter is clearly demonstrated by the fact that it regarded communications to it by Johnsons' client as privileged communications, and refused to divulge any information with regard thereto even after the Johnsons had learned that there had been some negotiation behind the scenes and had requested information concerning them.

Metropolitan seeks to justify its actions on the ground that it was effectuating company policy by attempting to get into the hands of the beneficiary under a family policy as much of the proceeds thereof as possible, while at the same time arguing it had no interest in the fund. However, regardless of the motives that prompted the Company into so actively participating in behalf of claimant, its actions in this case constituted unjunstifiable interference with the client-attorney relationship that existed between claimant and the Johnsons. Its failure to notify the Johnsons about claimant's communication was an act of bad faith on the part of Metropolitan which cannot be absolved by indications of intent to benefit the beneficiary or to effectuate some company policy of securing to the beneficiary as much of the insurance proceeds as possible. Metropolitan, through its counsel, improperly communicated behind the scenes with claimant and an attorney other than Johnsons, the retained counsel. This was contrary to the Canons of Professional Ethics of the American Bar Association, more particularly Canon 9 which provides:

"A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel . . ."

It is clear from the record that rather than conciliate the dispute between claimant and her lawyers, Metropolitan acted in an unusual and partisan fashion, working to effectuate a payment to claimant that would by-pass the Johnsons in their rightful role of attorneys for claimant. We do not condone such action. We must, therefore, hold that the hearing judge erred in discharging Metropolitan from further liability and in holding that Metropolitan was entitled to an attorney's fee and court costs.

We turn now to the question of the propriety of the Johnson fee and the reduction thereof by the court below. The hearing judge obviously refused to believe the testimony of claimant relating to the Johnsons' treatment of her as a client, which described treatment if believed, would fall below the professional standards required of members of the Bar. Her credibility, however, was a matter for the hearing judge, and the record reveals no abuse of discretion in his conclusion that "We feel that the (Johnsons) have acted for the best interest of their client, they have done good work, and certainly deserve the compensation to a good steward, so to speak." This determination is substantiated by the report and testimony of Attorney William Jacob, Vice-Chairman of the Committee on Offenses of the Court of Common Pleas of Allegheny County, who had investigated the matter after complaint by claimant.

The hearing judge determined that the Johnsons were not guilty of the misconduct testified to by claimant, that they had done good work in her behalf, and that the contingent fee contract had been knowingly signed by her and was not invalid for any reason. Having made this determination, he could not thereafter proceed to reduce the agreed-to fee on the basis of the "dire need" of Mrs. Edwards and the minor children. The Court stated:

> "And while we feel that there may be some question, or at least (Edwards) questions the power of attorney awarding this compensation on a 60-40 basis, as I understand it, we feel in fairness — not because of lack of work or not because of inconsistencies or irregularities of the (Johnsons), as complained of by (Edwards), but on the basis of the overall coverage of this case, the overall return; and on the basis of the plaintiff's complaint of this dire need of funds and because of the minors involved — we feel that the claim of 60-40 should be reduced."

It is our opinion that the court was powerless to so rewrite the agreement between the parties once it upheld the validity thereof. As stated by the Supreme Court in *DiPompeo v. Preston,* 385 Pa. 512:

> "The defendants here are seeking to take Equity into a realm where it has no right or duty to enter. While Equity stands ready to rescue the lambs from the wolves, it has no obligation to guide persons who are sui juris in the conduct of their own affairs or to save them from the results of their own imprudence, if there be imprudence. Equity cannot contract for the parties. *It is only*

where circumstances come to light which so shock the concept of fairness and justice that it would be unconscionable to enforce the bargain that Equity intervenes."

As a last addition, it must be noted that Judge Fiok had already entered judgment against claimant and in favor of the Johnsons when claimant failed to file Answer to the allegations of the new matter of Johnsons' Complaint that she was liable to them for the forty (40%) per cent fee under the contingent fee agreement and the assignment. Such judgment would preclude her further litigating the issue of her liability therefor to the Johnsons. *In Breckline v Metropolitan Life Insurance Co.*, 406 Pa. 573, the Supreme Court held that the lower court had improperly entered judgment on the pleadings against the widow-claimant for the reason that:

"The widow-claimant's answer effectively denied the execution and existence of the designation in favor of the plaintiff, and demanded proof thereof. In view of this, the court below erred in entering judgment on the pleadings. Such a denial requires proof before the execution of the instrument, which is vital to plaintiff's case, may be deemed to exist . . ."

It would follow from the above that when no answer was filed to Johnsons' New Matter by claimant, a judgment on the pleadings can be entered against her, with all the full force and effect of any other judgment on the pleadings.

We accordingly find that the court below erred in its orders granting an award to claimant and awarding

costs and fees to Metropolitan and discharging it from all liability and from future costs. We find that the record in this case, for the reasons hereinbefore set forth, requires a reversal of those orders and a grant to the Johnsons of the full amount of the interpleaded fund, to-wit, $8,036.77 with interest from April 6, 1967, the date the Johnsons marked the case settled and discontinued and delivered to Metropolitan a certificate of Satisfaction, Settlement, and Discontinuance.

We see no reason for remanding the matter for further hearing in this already unreasonably protracted matter, the rights of the parties clearly appearing of record. This Court, under the Act of June 24, 1895, P. L. 212, §8, par. 8 (17 P.S. §192) has the authority and power to reverse and modify any order, judgment or decree as it may think to be just. We remand the case solely for the purpose of having the Prothonotary enter the judgment as herein modified on the appropriate dockets.

Orders of December 3, 1968 and December 5, 1968 are hereby reversed, costs to be borne by appellee.

Appeal from the Order of Julge McKenna of June 2, 1967 is hereby quashed.

Upon compliance with the judgment herein modified, the Metropolitan Life Insurance Company shall be entitled to have entered in its favor an order of discharge.

Spaulding, J., files a concurring opinion.

[Caption Omitted]

Concurring Opinion

CONCURRING OPINION BY SPAULDING, J.:

Although concurring in the result, I do not fully agree with the reasoning of the majority in two phases of this litigation.

First, since the appeal from judgment in *Elwards v. Metropolitan Life Ins. Co.*, 212 Pa. Superior Ct. 751, 242 A.2d 281 (1968), was a final determination of the propriety of Judge Fiok's order granting interpleader, it is not now necessary to determine whether that order was interlocutory or final and appealable. In *Fisher v. Stevens Coal Co.*, 136 Pa. Superior Ct. 394, 7 A.2d 573 (1939), an order granting equitable interpleader was held final and appealable where the entry of the order affected the substantive right of the interpleader parties to recover against the petitioner. As indicated in *Winnet v. Brenner*, 409 Pa. 150, 185 A.2d 318 (1962), *Fisher* is an exception to the general rule that orders granting interpleader are interlocutory.

Fisher is not applicable in the instant case. The dispute between the parties is limited to which of them are entitled to the interpleaded fund; unlike *Fisher*, there is no suggestion that Metropolitan may have an aggregate liability to both parties beyond the interpleaded amount.

Secondly, as against Edwards, I conclude that Johnson, Johnson & Johnson is entitled to the entire interpleaded fund solely upon the principle of res adjudicata. In *Edwards v. Metropolitan Life Ins. Co., supra*, Edwards asserted that orders directing entry of judgment in favor of Johnson, Johnson & Johnson and

denying Edwards' petition to open, vacate, or modify the judgment were in error due to the impropriety of the Johnsons' professional conduct. As this Court upheld the propriety of the contingent fee agreement in Edwards, the court below erred in again reviewing it.

In relying upon *DiPompeo v. Preston,* 385 Pa. 512, 123 A.2d 671 (1950), the majority suggests that contingent fee agreements must be enforced to the same extent as other contracts. I cannot agree. Unlike other contracts, contingent fee agreements are subject to the inherent powers of the courts to supervise the administration of justice and may be reduced whenever found, under the particular facts of individual cases, to be unreasonable. A.B.A., Canons of Professional Ethics, Canon 13; *Thompson Estate,* 426 Pa. 270, 232 A.2d 625 (1967); *Richette v. Pennsylvania R.R.,* 410 Pa. 6, 187 A.2d 910 (1963); *Tipton National Bank v. Holland,* 190 Pa. Superior Ct. 501, 154 A.2d 252 (1959). Consequently, I do not concur in the implication that contingent fee agreements are fully enforceable unless governed by the equitable doctrine of unconscionability. The Johnsons' right to the entire fee in this case has been fully considered previously and finally determined, and it is unnecessary to consider again whether it should be reduced.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

MARY LOUISE EDWARDS, Plaintiff
and
OLIVER L. JOHNSON, LIVINGSTONE M. JOHNSON and JUSTIN M. JOHNSON, co-partners under the name of JOHNSON, JOHNSON & JOHNSON, Additional Plaintiffs
v.
METROPOLITAN LIFE INSURANCE COMPANY, a corporation, Defendant

No. 1040
July Term
1967
In Assumpsit

Opinion of Trial Judge

The Court:

Gentlemen, as you are well aware of the Court's position in these matters now before it, there was a petition for discharge presented by the defendant, Metropolitan Life Insurance Company, a petition for discharge under Rule 2307-B, together with a petition for costs and attorney's fees in connection with this petition and in connection with the proceedings filed at 1040 July Term, 1967. There was also a petition for disposition of the money that was paid into Court filed by the additional plaintiffs, Johnson, Johnson & Johnson, filed at the same term and number. These matters have been before the courts on numerous occasions, not on these particular proceedings, but on other issues; and the Court, as you know, was disposed to hear all of these matters in the same proceedings, with a view of attempting to reconcile the differences in all of these matters.

There were objections or an answer filed to the petition for discharge with inferences that there was collusion between the stakeholder, so to speak—Metropolitan Life—and the original plaintiff. There were issues and inferences submitted that the original plaintiff was dissatisfied with the claim of the additional plaintiffs for their fees, that it was excessive and unjustified. And so in reaching a conclusion as to these matters, we will address ourselves first to the petition for discharge under Rule 2307-B, together with Mr. Black's motion.

Inconsidering the testimony and arguments of counsel the Court is drawn to the conclusion that Metropolitan Insurance Company, the defendant, through its attorneys or agents—attorneys is preferable—did, in the circumstances, everything that they had a perfect right to do. Here was a situation where there were, in effect, two claims for the same fund. Metropolitan paid that money into Court on the theory, of course, as we understand it, that they did not want to be placed in the position of having to pay the same claim twice. There was some correspondence, as has been deduced from the evidence, that the original plaintiff contacted Mr. Black of Metropolitan Life. As far as we understand, that is the first knowledge he had of the plaintiff, and certainly that is the first knowledge or the first contact that the original plaintiff had with Mr. Black with respect to this money that the insurance carrier was holding in connection with the policy covering the deceased, Mr. Rumble.

Considering the testimony, we do not see, nor can we conclude that there was any connivance between Metropolitan, or its attorneys, and the original plaintiff and Mr. Zehner, her attorney. We cannot conclude that

there was any partiality shown. At the best we are compelled to consider the action of Mr. Black in his efforts to amicably settle this entire matter, and any suggestions that he made—as we see it—were with the view of attempting to reconcile the differences between the original plaintiff and the additional plaintiffs in this matter, to try to work out a settlement that would be helpful not only to the plaintiffs, but to the original plaintiff's children as well, they being minors at the time. So that any partiality as demonstrated within the rule for discharge is missing, as we see it. We see no connivance. Everything points to an effort on Metropolitan's part, through its duly authorized representatives, to try to reconcile this entire matter.

And while we can appreciate the additional plaintiffs' position, that in the first instance Metropolitan had no business questioning the claim of the additional plaintiffs; that is to say, what their bill was was of no concern to Metropolitan—and I think their position was correct—but the concern of Metropolitan was not, as we see it, with a view of attempting to tell the additional plaintiffs what their bill should be, but with a view of attempting to find out what it was so that they could try to work out a settlement, as we see it.

And so we must conclude that Metropolitan has met the requirements of Rule 2307-B of the Pennsylvania Rules of Civil Procedure, and in so doing we must conclude and hereby decree that the defendant, Metropolitan Life Insurance Company, is discharged of all liability to the plaintiff, Mary Louise Edwards, and to the additional plaintiffs, Oliver L. Johnson, Livingstone M. Johnson, and Justin M. Johnson, in respect to the moneys paid by the defendant into the Registry of this Court.

It is further ordered that the defendant, Metropolitan Life Insurance Company, be allowed its costs and an attorney's fee not to exceed $500, from the moneys paid by the defendant into the Registry of this Court.

As to the petition of the additional plaintiffs for the disposition of the money paid into Court; it is obvious that rather than nothing having been done by the additional plaintiffs, a good deal of service had been performed. While this proceeding was drawn out and lengthy, we do not see it as being the fault of the additional plaintiffs. There are always complications in matters of this sort particularly in view of the defendant's position on their original setup. Because of the very nature of the case, it necessitated a drawn-out procedure to finally culminate and crystallize a definite position one way or another. It makes no difference whether that position were crystallized in Court through trial or through negotiation of counsel for the litigants, or whether it was decided by the board of directors of the defendant corporation. The point is that this whole process took time and certainly energy and consideration and thought, as was pointed out here. The additional plaintiffs researched this question because it was doubtful originally that there could conceivably be a claim. All of this takes time, money, and expense. And so we cannot help but realize and feel, in view of the circumstances and the multitudinous actions in which the additional plaintiffs represented the original plaintiff, all of these things entailed time, money, and expense.

And we certainly appreciate the original plaintiff's position; that anxiety and the waiting and the frustra-

tion that developed because of lack of funds, and the desperation that was created. There is testimony here that the original plaintiff did not understand the power of attorney that she signed. We feel that the additional plaintiffs, with the reputation that they have established down through the years—particularly the elder Mr. Johnson—well informed the original plaintiff as to what this proceeding was all about and why it was necessary that she sign some instrument with respect to the fee that would be charged and with respect to the authority granted in that instrument.

There is some evidence here that the original plaintiff received a thousand dollars and then was compelled, in effect, to pay that money back in in installments at $22 and something a month—I have forgotten the exact amount—to the additional plaintiffs as part of their fee for other work. The additional plaintiff has explained that monetary transaction in black and white, not only from the correspondence received from Cyclops for returns on the insurance policy—the group insurance, as I understand it—as well as the endorsed checks paid to the plaintiff. We feel that the additional plaintiffs have acted for the best interest of their client, they have done good work, and certainly deserve the compensation to a good steward, so to speak. And while we feel that there may be some question, or at least the plaintiff questions the power of attorney awarding this compensation on a 60/40 basis, as I understand it, we feel in fairness—not because of lack of work, or not because of inconsistencies or irregularities of the additional plaintiffs, as complained of by the plaintiff, but on the basis of the overall coverage in this case, the overall return; and on the basis of the plaintiff's com-

plaint of this dire need of funds and because of the minors involved—we feel that that claim of 60/40 should be reduced.

So we are going to direct that from the funds paid into this Court at the above number and term, that the sum of $6,500 be paid from that fund to Oliver L. Johnson, Livingstone M. Johnson and Justin M. Johnson, co-partners under the name of Johnson, Johnson & Johnson, additional plaintiffs; and the balance thereof be paid to the original plaintiff; and that the original defendant be discharged from any and all liability.

Off the record.

(Discussion off the record.)

The Court:

It is further ordered that each of the parties pay their own respective costs in this proceeding.

Off the record.

(Discussion off the record.)

Mr. Johnson:

If the Court please, could the record indicate a general exception to the additional plaintiff.

The Court:

We will so note it on the record.

Mr. Zehner:

Note for me a general exception to this order.

(PROCEEDINGS CLOSED.)

Order for Discharge of Defendant.

[Caption Omitted]

Order for Discharge of Defendant.

Now, to-wit, this 5th day of December, 1968, upon consideration of the petition of the defendant, Metropolitan Life Insurance Company, for discharge under Rule 2307(b) of the Pennsylvania Rules of Civil Procedure and the answer thereto the additional plaintiffs, after hearing and argument, the petition is hereby granted and it is hereby ORDERED, ADJUDGED and DECREED that the defendant, Metropolitan Life Insurance Company, is discharged of all liability to the plaintiff, Mary Louise Edwards, and to the additional plaintiffs, Oliver L. Johnson, Livingstone M. Johnson, and Justin M. Johnson, co-partners under the name of Johnson, Johnson & Johnson, in respect to the moneys paid by the defendant into the registry of this Court, namely, the sum of $8,036.77 on July 12, 1967, and the sum of $128.15 on September 29, 1967, and the defendant is hereby discharged from all liability for any costs incurred after the entry of this order.

BY THE COURT,
s/ WESSEL,
J.

Eo die, Exception to additional plaintiffs noted and bill sealed.

ARTHUR WESSEL, JR.,
Judge.

12-4-68

Order for Award of Costs to Defendant.

[Caption Omitted]

Order for Award of Costs to Defendant.

Now, to-wit, this 5th day of December, 1968, upon consideration of the petition of the defendant, Metropolitan Life Insurance Company, for allowance of costs and attorneys' fees, and the answer thereto of the additional plaintiffs, after hearing and argument, the petition is hereby granted and it is hereby ORDERED, ADJUDGED and DECREED that the defendant, Metropolitan Life Insurance Company, be allowed its costs which have been incurred by it in this action and attorneys' fees in the aggregate amount of $500 to be paid from the moneys paid by the defendant into the registry of this Court, and the Prothonotary is hereby directed to make payment therefrom in said amount to counsel of record for the defendant.

BY THE COURT,
s/ WESSEL,
J.

Eo die, Exception to additional plaintiffs noted and bill sealed.

ARTHUR WESSEL, JR.,
Judge.

12-4-68

Order for Award of Costs to Defendant.

[Caption Omitted]

Order for Disposition of Fund.

Now, to-wit, this 5th day of December, 1968, upon consideration of the petition of Oliver L. Johnson, Livingstone M. Johnson and Justin M. Johnston, co-partners under the name of Johnson, Johnson & Johnson, additional plaintiffs, for the disposition of money paid into Court, it appearing that Metropolitan Life Insurance Company, the defendant, having heretofore been discharged from liability under Rule 2307(b) of the Pennsylvania Rules of Civil Procedure and allowed the sum of $500 for its costs and attorneys' fees out of such fund, after hearing and argument and pursuant to Rule 2315 of the Pennsylvania Rules of Civil Procedure, it is hereby ORDERED, ADJUDGED and DECREED that the balance of the fund so remaining on deposit in the registry of this Court be disposed of by awarding the sum of $6,500 to the additional plaintiffs Oliver L. Johnson, Livingstone M. Johnson, and Justin M. Johnson, and the balance of such fund, namely, $1,132.84, to the original plaintiff, Mary Louise Edwards, and the Prothonotary is hereby directed to make payment therefrom in said amount to the counsel of record for the additional plaintiffs and for the original plaintiff. It is further ORDERED that each of said parties shall bear their own costs.

BY THE COURT,
s/ WESSEL,
J.

Eo die, Exceptions to plaintiff and additional plaintiffs noted and bill sealed.

ARTHUR WESSEL, JR.,
Judge

IN THE SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DIVISION

MARY LOUISE EDWARDS, Appellee, and OLIVER L. JOHNSON, LIVINGSTONE M. JOHNSON and JUSTIN M. JOHNSON, co-partners under the name of JOHNSON, JOHNSON & JOHNSON, Appellants, v. METROPOLITAN LIFE INSURANCE COMPANY, Appellee	No. 89 April Term, 1969

Decision

November 14, 1969

Orders of December 3, 1968, and December 5, 1968, are hereby reversed, costs to be borne by appellee.

Appeal from the order of Judge McKenna of June 2, 1967, is hereby quashed.

Upon compliance with the judgment herein modified, the Metropolitan Life Insurance Company shall be entitled to have entered in its favor an order of discharge.

CERCONE, J.

Spaulding, J., files a concurring opinion.

[Caption Omitted]

Petition for Reargument

To the Honorable, the Judges of said Court:

The petition of Metropolitan Life Insurance Company, defendant in the above captioned case, for the reargument of the case, following the handing down of the Court's opinion dated November 14, 1969, respectfully represents:

I. The Court misapprehended what Metropolitan's claim of justification was, when it was described in the opinion as: ". . . effectuating company policy by attempting to get into the hands of the beneficiary under a family policy as much of the proceeds thereof as possible . . ." Rather it was, as testified by the witness Helitzer (R. 563a-564a), that Attorney Zehner had informed Metropolitan's counsel that the beneficiary claimed that if the settlement check were a single one for the whole amount made payable jointly to her and her counsel of record and delivered to them (the Johnsons), she would be forced to endorse that check to receive her share of the settlement, and were Metropolitan to so deliver such a check in disregard of such notice, it would be subject to a claim by her subsequently for whatever portion of the settlement she might assert that the Johnsons, with Metropolitan's collusion, had wrongfully exacted from her.

* * * * * * *

(3) Particularly since the only rebuttal witness the court below heard (Jack B. Helitzer), who was heard out of order during the defense because he was from out of town (R. 481a-484a), testified on cross-examination by counsel Justin M. Johnson that the only

knowledge he had of the dispute between the beneficiary and her counsel was received from Metropolitan's local counsel's office (R. 563a), and since counsel Black's cross-examination of the witness Livingstone M. Johnson was limited, on objection by the Johnsons, to what he had testified to on direct examination (R. 533a), Metropolitan's evidence to rebut the charges made against it by the Johnsons was not presented to the Court below; the relief it was seeking was granted without it being required to offer this important rebuttal testimony. If, in reversing the decision of the Court below in Metropolitan's favor, the remand does not permit Metropolitan to present its case in rebuttal, it will have been convicted of improper actions without opportunity to show its innocence of the charges, contrary to the due process clauses of both the Constitution of the United States and the Constitution of Pennsylvania.

* * * * * * *

II. The Court misapprehended the facts of the case when it stated in its opinion that Metropolitan knew, when it closed the settlement with the Johnsons and mailed the beneficiary her check, that the beneficiary would not endorse the check for the amount of the 40% fee, made payable jointly to the beneficiary and the Johnsons.

* * * * * * *

(4) Before judgment is passed on the propriety of what Metropolitan did in this case, we submit that due process requires that it be afforded an opportunity, by way of offering its case in rebuttal, particularly the testimony of its counsel, to show what the reasons were that dictated its course of action.

III. The Court misapprehended the facts of the case in concluding, as stated in its opinion, that Metropolitan, through its counsel, improperly communicated behind the scenes with the beneficiary and an attorney other than the Johnsons.

* * * * * * *

(2) As Metropolitan's counsel Black will testify, if the case is remanded with instructions to hear Metropolitan's case in rebuttal, he made the decision not to mention or show the beneficiary's letter to either her counsel of record in the case, the Johnsons, or to her counsel in the matter of her fee dispute, Attorney Zehner, because the letter did not relate to any matter in controversy, but discussed only her dire need for money. He made no response to the letter. Both Metropolitan and its counsel Black are entitled, as a matter of due process of law, to an opportunity to present testimony to explain his handling of the letter before either one is convicted of impropriety.

* * * * * * *

[Caption Omitted]

Order

And now, this 4th day of December, 1969, petition refused.

Cercone, J.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MARY LOUISE EDWARDS, Appellee in the Superior Court, and OLIVER L. JOHNSON, LIVINGSTONE M. JOHNSON AND JUSTIN M. JOHNSON, Co-partners under the name of JOHNSON, JOHNSON & JOHNSON, Appellants in the Superior Court, v. METROPOLITAN LIFE INSURANCE COMPANY, Appellee in the Superior Court.	No. 3182A Miscellaneous Docket

Petition for Allowance of Appeal to Supreme Court

To the Honorable, The Chief Justice and the Justices of the Supreme Court of Pennsylvania:

Your petitioner, METROPOLITAN LIFE INSURANCE COMPANY, respectfully represents:

* * * * * * *

6. Metropolitan in its Petition for Reargument, addressed to and refused by the Superior Court, set forth in detail the particulars in which the Superior Court, as shown by its opinion, misapprehended the facts of the case, and stated what its testimony in rebuttal would show to the contrary of the Superior Court's findings. For these matters we refer to the Petition for Reargument, a true and correct copy of which is attached hereto. The Superior Court, in denying Metropolitan the right to present its rebuttal on

remand of the case to the court below, has deprived Metropolitan of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States: *Saunders v. Shaw,* 244 U. S. 317, 61 L. Ed. 1163, 37 Sup. Ct. 638 (1917); and also in violation of the due process clause of the Constitution of Pennsylvania: Art. I Sec. 9. It also acted contrary to the decision of this court in *Schoen v. Elsasser,* 315 Pa. 65, 192 Atl. 301, holding that in the circumstances of the case at bar rebuttal is a mater of right, and contrary to this Court's decision in *Commonwealth ex rel. Harry v. Eastridge,* 374 Pa. 172, A. 2d 350, holding that weight is to be given on appeal to the fact that the credibility of witnesses and the weight to be given their testimony can best be determined by the judge before whom they apear. The Superior Court's decision is also contrary to the holding of this Court in *Hughes v. Miller,* 192 Pa. 365, 43 Atl. 976, which would require that the record be remitted to the court below for such judgment as law and justice require, thus allowing review of the overruling of Metropolitan's objections to certain evidence offered by the Johnsons, particularly the report made by Wiliam L. Jacob to the Committee on Offenses (324a, 332a-333a), upon which the Superior Court relied in its findings (Opinion, p. 394).

[Caption Omitted]

Order

February 16, 1970

Petition denied.

Per Curiam